Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CECILIA LACKS,
Petitioner,

v.

FERGUSON-FLORISSANT REORGANIZED
SCHOOL DISTRICT, R-2,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a public school teacher is terminated for speech that she could not reasonably have understood to violate a school district policy, is the First Amendment requirement of reasonable notice satisfied merely because it is linguistically possible to construe the district's policy as prohibiting the speech in question?

2. Where an employee would not have been terminated but for the racial animus of supervisors who played a crucial role in the termination process, does the fact that the ultimate termination decision was made by a body which was not itself racially motivated preclude holding the employer liable under Title VII?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 147 F.3d 718 (8th Cir. 1998), and is reprinted at App. 1a-15a. Judge McMillian wrote an opinion dissenting from the denial of rehearing en banc, reported at 153 F.3d 904 (8th Cir. 1998) and reprinted at App. 16a-36a. The opinion of the District Court for the Eastern District of Missouri on issues decided prior to trial is reported at 936 F. Supp. 676 (E.D. Mo. 1996), and is reprinted at App. 37a-54a.

JURISDICTION

The Court of Appeals entered judgment on June 22, 1998 and denied rehearing and rehearing en banc on September 17, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "[n]o State . . . shall . . . deprive any person of life, liberty, or property without due process of law."

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e(b), provides in pertinent part as follows:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . .

> The term "employer" means a person engaged in an industry affecting commerce . . ., and any agent of such a person.

STATEMENT OF THE CASE

A. Overview

Petitioner Cecilia Lacks was an award-winning tenured teacher who had been employed for more than twenty years by Respondent Ferguson-Florissant Reorganized School District ("District") when the District terminated her employment on March 23, 1995.

The stated reason for the decision to discharge Lacks was that she had not disciplined students who, in response to a drama-writing exercise that Lacks had assigned, wrote and read aloud in the classroom from scripts in which the fictional characters created by the students uttered profanity. According to the District, in refraining from meting out discipline to the students, Lacks improperly failed to enforce a prohibition against profanity set forth in the District's Student Discipline Code—a prohibition that, prior to Lacks' discharge, had not been applied or been understood to apply to profanity used in a work of fiction or creative writing, but only to profanity that students directed at other persons in real-life interactions.

Two claims are at issue in this Petition: (i) a First Amendment claim brought pursuant to 42 U.S.C. § 1983, on the theory that the termination was unconstitutional because Lacks was not on reasonable notice that the expressive activity for which she was terminated was prohibited by District policy;[1] and (ii) a Title VII claim

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[1] In addition to the First Amendment claim that is the subject of this petition, Lacks also presented to the jury a distinct First Amendment claim predicated on the theory that, even if she had received adequate notice, the District's decision to terminate her was not reasonably related to legitimate pedagogical concerns. The jury decided in her favor on this claim, but the Eighth Circuit set the verdict aside. App. 11a-12a. Certiorari is not sought as to this issue.

brought pursuant to 42 U.S.C. § 2000e *et seq.*, on the theory, *inter alia*, that supervisors who played crucial roles in the termination process were motivated by racial animus, and but for that racial animus, Lacks would not have been terminated.[2]

Both the First Amendment notice claim and the Title VII race discrimination claim were tried to a jury. On the notice claim, the jury found in favor of Lacks, answering "no" to a special interrogatory that asked, "Did plaintiff have reasonable notice that allowing students to use profanity in their creative writing was prohibited?" On the Title VII claim, the jury was asked (i) whether Lacks had proven "by a preponderance of the evidence" that "plaintiff's race was a motivating factor in her termination," and (ii) whether the defendant had "proven by the preponderance of the evidence that defendant would have discharged Lacks regardless of her race." The jury decided in Lacks' favor on both questions, answering the first question "yes," and the second question "no."

The District Court entered judgment for Lacks on these claims in accordance with the jury's verdict. The Eighth Circuit, for reasons set forth *infra* at 13-14, reversed and ordered that judgment notwithstanding the verdict be entered in favor of the District. Petitioner requested rehearing en banc, which the Eighth Circuit denied over the dissent of Judges Theodore McMillian and Morris Sheppard Arnold.

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[2] Lacks also brought a state-law claim that her discharge violated the Missouri Teacher Tenure Act, Mo. Ann. St. § 168.114.1. The District Court decided that claim in her favor, *see* App. 44a-48a, but the Eighth Circuit reversed. App. 6a-9a. Lacks does not petition for certiorari as to that claim.

This action originally was filed in state court but was properly removed by respondents. App. 5a.

B. Statement of the Facts [3]

1. In October 1994, Lacks gave the students in her eleventh grade English class, who were studying a unit on drama, an assignment that required four groups of students to write plays about themes that were important to them, using dialogue natural to the characters created. Tr. 410.[4] The students were then to read in the classroom from the scripts they had written, and those classroom presentations were to be videotaped so that the students could see themselves speak and thereby work to improve their oral presentation skills. Tr. 416.

Lacks did not encourage the students to use profanity in the plays. Tr. 411. However, three of the four student groups prepared scripts touching on themes such as gang violence and inter-gang romances, and those scripts contained a great deal of profanity, including the word "fuck," as well as frequent uses of the word "nigger." [5] At least in part, the students were writing on matters known to them from experience. Karen Price, the Chairman of the English Department at Berkeley High School, where Lacks taught, testified that "many of our students have experienced violence in their lives. I personally know that in real life, one of the students on the video was arrested on a drug charge. In real life, one of the male students witnessed a random shooting of a child by warring gangs." Tr. 953.

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[3] Because the two claims at issue were decided in Lacks' favor by a jury, the court below acknowledged that, on review, the court was required to credit the testimony of Petitioner's witnesses and to accept as true all of the evidence adduced at trial that was favorable to Petitioner. App. 13a. We do the same in this Statement of Facts.

[4] We cite to the trial transcript as "Tr.," and to the transcript of the School Board hearing as "Hrg. Tr." Trial Exhibits are cited as "Exh.," and exhibits introduced at the School Board hearing are cited as "Hearing Exh."

[5] All of the students in Lacks' English class were African-American, as was 98% of the student body of Berkeley High School. Tr. 1401.

2. A District policy—Policy 3043—required "all employees of the district," including teachers, to "share responsibility for supervising the behavior of the students and for seeing that they meet the standards of conduct" set forth in the District's "Student Discipline Code." Exh. 96 at 55.

The Student Discipline Code prohibited "[s]tudent behavior that is disorderly or unacceptable," and it listed the following examples of such "behavior":

> tardiness, unexcused absence, leaving school grounds without permission, cheating, fighting, theft, gambling, use of tobacco products in unauthorized areas, forgery, littering, profanity, insubordination, refusal to identify self to school officials, verbal abuse, refusal to comply with directions of staff, class disruption, inappropriate dress, obscene gestures, lying to school authorities, inappropriate physical contact between students, possession of glass bottles, and any other inappropriate behavior as defined by school officials.

Id. at 109.

3. Prior to Lacks' case, there were numerous instances, occurring over a period of many years while the Student Discipline Code was in effect, in which high school students in the District, with the awareness of District administrators, had used profanity in their creative writing. There were no cases, however, in which a District administrator had ever suggested that the Student Discipline Code applied to profanity in that context, much less were there any cases in which the District had imposed any discipline, either on the students involved or on the teachers.

On at least two earlier occasions, students in Lacks' classes had read poetry containing profanity, including the word "shit" and the word "nigger," in the presence of a school administrator, who did not raise any objection. Tr. 505-06, 512-13, 841. Indeed, on one of those occasions the administrator wrote a positive evaluation of the day's lesson, stating that the lesson was "effective and in-

teresting" and that he "was impressed by the fact that the students were not reluctant to share their writing," which he attributed to the "supportive atmosphere [Lacks] created in the class." Tr. 513. On another occasion, one of Lacks' students wrote a short story containing profanity, and, despite the profanity, the story was displayed without objection on the library wall. Tr. 378-79.

On still another occasion, a student of another teacher in the District wrote a play called "Everything You Always Wanted to Know About Sex But Were Afraid to Try," and named the characters Freddy Fuck, Peter Prick, Sally Slut, and Penny Prude. Tr. 2043-44. The assistant principal read the play and "just laughed about it"; he disciplined neither the student nor the teacher. Tr. 2044. (The teacher had given the student an "A" grade for the play.)

In addition, Vernon Mitchell, the principal of Berkeley High School and the person who initiated the disciplinary proceedings against Lacks, did not discipline the students or the teacher involved in a 1992 student-written school-sponsored play that, by Mitchell's own admission, contained profanity; on the contrary, Mitchell went on stage to publicly congratulate the students and the teacher after a performance of the play for parents and the community at large. Tr. 1380, 1383-86. In addition to profanity, that play, called "How Ya Livin'," contained a depiction of a gang member desecrating the body of a victim of violence, as well as sexually suggestive dancing and a scene featuring a student actor lewdly pulling on his crotch and referring to it as his "thang." Exhs. 247, 248. The teacher who sponsored "How Ya Livin'," Sharita Kyles, is an African-American, as is Mitchell. Lacks is white.

4. It was undisputed that Lacks diligently enforced the Student Discipline Code when she encountered students using profanity in their interactions with others. Tr. 451-52, 1037. But the understanding not only of Lacks, but of other District teachers prior to Lacks' case, and of administrators as well, was that the Student Discipline

Code did not apply to profanity used by students in their creative writing.

Thus, Karen Price, the Chairman of the English Department at Berkeley High School, testified as follows in response to a question asking her to state her understanding of the Student Discipline Code:

> A. I did not think it was related to creative writing or reading of literature. I thought it had to do with student *behavior*.
>
> Q. Would you say that a student writing creative writing in the classroom no matter what language is contained in the writing, do you feel that student would be necessarily misbehaving because they include street language?
>
> A. I don't think they are misbehaving.
>
> Q. What do you think they are doing?
>
> A. I think that they are trying to put words in a character's mouth that reflect what kind of person they are writing about. . . .
>
> Q. Have you ever known of a teacher to be disciplined for what was contained in a student's creative writing?
>
> A. No.
>
> Q. Or for profanity or street language contained in the student's creative writing in the classroom.
>
> A. Never.

Tr. 963-64 (emphasis added).

Two District *administrators* testified to the same effect.[6] Indeed, the only person who claimed to believe that the

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[6] Dr. Larilyn Lawrence, the District's Curriculum Coordinator for Reading and Language Arts, testified as follows:

> Q. . . . [A]re you aware of any policy or rule in the Ferguson Florissant School District that prohibits teachers in the classroom from allowing students to include street language in their creative writing?
>
> A. No, I am not.
>
> * * * *

[Continued]

Student Discipline Code applied to profanity in students' classroom works was one of the administrators who made the decision to bring the Policy 3043 charge against Lacks. That administrator, Barbara Davis, stated that, as she read the Student Discipline Code, it prohibited a student even from reading profanity aloud from a recognized work of literature as part of a classroom assignment. Tr. 1700; *see also* Hrg. Tr. 792. Davis admitted, however, that the Code never had been applied in the context of any classroom assignment prior to Lacks' case. Tr. 1701.

5. The methodology according to which Lacks taught creative writing at Berkeley High School was one that she had employed during her entire career with the District—a methodology that, throughout that time, the District itself had endorsed and recommended to teachers of creative writing both within the District and nationwide. Tr. 345-46, 348, 350. Referred to at trial as the "student-centered" method, and originally developed in the 1960's by noted educator James Moffett, this method's central tenets, as summarized in guidelines *distributed to teachers by the District*, are as follows:

> Don't tell writers what should be in their [creative] writing or worse, write on their pieces. Build on what writers know and have done, rather than be-

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[6] [Continued]

> Q. Well, how is a student including a piece of street language or profanity in creative writing, do you think, how does the Student Discipline Code apply to that?
>
> A. I just don't think it does. We're talking about here an assignment where you're creating characters, and in order to create them, if you need to use the language, the setting, the situations that those characters are in, then you create a script, a play, and that is, I suppose, no different than writing an essay. It's a special kind of an assignment. It's not just the back and forth of kids in the classroom without any assignment attached.

Tr. 1263-65.

Dolores Graham, who served as a principal in the District for more than eleven years and as an assistant principal for longer, gave similar testimony. Tr. 1098-99.

> moaning what's not on the page, what's wrong with what is there. Resist making judgments about the writing.

Tr. 348; Exh. 195, pp. 4-5.

As Lacks explained at trial, this method dictates that the teacher should not attempt to control the content and language of student creative works—particularly students' initial creative efforts—

> [b]ecause from the research and from information even in our own curriculum, students shut down when a teacher starts making judgments about the content. The students simply decide that they are writing then for the teacher, and the whole concept of voice that I talked about before just totally disappears. Students think they have no voice.

Tr. 351.

Lacks recounted a specific example of how, during the 1992-1993 school year at Berkeley, her use of the student-centered method led one student, Reginald, to progress during the semester from total non-participation in classroom activities, to initial efforts at poetry that were highly disjointed and laden with profanity, to composing accomplished poems without profanity, including a poem that won the highest district-wide award for student poetry. Tr. 367.[7]

Expert witness testimony—including testimony from the Executive Director of the National Council for Teachers of English—established that the student-centered method is widely used with success in secondary schools throughout the country, Tr. 1106, 1114-18, and that it is not unusual to see, particularly in first attempts at creative writing, profanity of the kind that appeared in the video-

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[7] Judge McMillian's opinion dissenting from the order denying en banc rehearing in this case sets forth in full three of Reginald's later poems, including the award-winning poem, and quotes extensively from the trial testimony concerning how Lacks' teaching method was successful in improving Reginald's writing and getting him past the use of profanity. App. 23a-33a.

taped student drama exercises written by Lacks' students. Tr. 1181. One expert in student play-writing, when asked about her reaction to the videotape, stated that "[t]here was nothing surprising in that. The language was appropriate for the characters, and this is language that we have seen in classrooms across the country." Tr. 1181.

6. The disciplinary process that led to Lacks' termination was initiated by Principal Vernon Mitchell, who learned of the existence of the videotaped drama exercise in January, 1995, three months after the exercise had taken place. As Mitchell admitted at trial, he saw the drama exercise from the outset of his investigation in racial terms, *viz*, as "black students acting a fool and white folks videotaping it." Tr. 1392. Mitchell testified that he used those words when he was telling one of Lacks' African-American students, Everette, what it was that had "offended" Mitchell about the incident. Tr. 1393.[8]

Quite apart from his reaction to the videotape, there was evidence that Mitchell "had displayed signs of hostility to white teachers at Berkeley because Mitchell believed that some white teachers did not care about the students." App. 13a. *See also* Tr. 1492 (testimony from School Board member that there had been "several" complaints from teachers to the effect that Mitchell was prejudiced against white teachers). And, as we have noted, Mitchell did not take any adverse action against Sharita Kyles, the African-American teacher who sponsored the production of "How Ya Livin'," the student-written play that contained profanity and obscene gestures.[9]

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[8] Mitchell used similar racial terminology when speaking about the incident with District Curriculum Coordinator Larilyn Lawrence. Tr. 1269.

[9] The record also reflects that, in the spring of 1994, an African-American substitute teacher, John Mitchell (who, unbeknown to Lacks, was Vernon Mitchell's nephew) showed a Louis Farrakhan videotape to Lacks' class and made anti-semitic remarks directed in part at Lacks, whom Mitchell knew to be Jewish. Tr. 495. In response to an assignment from Lacks to write a journal entry

As the Eighth Circuit stated in the decision below, there was evidence at trial that the District's Assistant Superintendent for Personnel, John Wright, who also was African-American, likewise viewed the videotaping incident in racial terms. App. 13a. It was Wright who conducted an investigation of the taped drama exercises after Mitchell brought the matter to his attention, and Wright drafted the charges against Lacks that were presented to the School Board.

7. Under the Missouri Teacher Tenure Act, Lacks had a right to a pre-termination hearing before the School Board, and she exercised that right by requesting a hearing.

At the beginning of the hearing, the District announced that it was pursuing just one charge of misconduct: that Lacks had willfully violated School District Policy 3043 by failing to enforce the Student Discipline Code to discipline students who used profanity in their creative works.[10] It was undisputed at the hearing, and it has

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relating to the day that the substitute teacher was present, a student wrote a paper which said:

> We read out loud about Louis Farrakhan and how the white people and the Jews tried to persecute them. But Louis wouldn't have it so he told them honkies and them Jews and them chinks that if they mess with his people, he mess with them, and also, Louis Farakhan [sic] believed that all white peoples are devils, and I agree, because all they want to do is use you for their own use. But check this, I ever seen a white or a Jew touch me, I'm going to kill the monkey crackers and them chinks because I hate them all. And another thing, I don't care what Hitler did to you. That was in Russia, and this is the U.S., and they love you all and hate us. Tr. 495.

Upon receiving this piece of writing, Lacks showed it to Mitchell and explained the circumstances under which it had been created. Tr. 496. Despite the profanity and racial hatred conveyed in the piece, Mitchell did not suggest that either the student or the substitute teacher be disciplined, Tr. 498, 501, nor in fact were they.

[10] The District's case was focused on the videotaped drama exercises, but the District also contended that Reginald's initial poems, *see supra* at 9, written in the 1992-1993 school year, constituted

remained undisputed, that, under Missouri law, for a school district to terminate a tenured teacher on such a ground, it is necessary for the district to establish a "willful" violation of a written regulation, which, in the case of Lacks, meant that the District had to prove "that Lacks violated the board policy prohibiting profanity, *and that she knew that the board policy applied to the profanity used by her students.*" App. 6a (emphasis added).

At the Board hearing, as at trial, Lacks testified that she did not believe that the Student Discipline Code applied to profanity in student creative works, that no one had ever suggested to her that the Code was applicable in that context, and that she had never heard of any instance in which any student had been disciplined for using profanity in that context, let alone any teacher for allowing it. Hrg. Tr. 484, 630-31. And, as at trial, Lacks called to the stand teachers and administrators who testified that they likewise had not understood it to be a violation of any policy for a teacher to permit students to use profanity in their creative writing. Hrg. Tr. 813, 823, 845; *see also* App. 44a-47a. Lacks also introduced evidence regarding Principal Mitchell's disparate treatment of her and Sharita Kyles, Hrg. Tr. 212, 215, and Mitchell's statement that what offended him about the videotape of Lacks' students was that it was "black students acting a fool and white folks videotaping it." Hrg. Tr. 221.

In its written decision terminating Lacks, the only evidence cited by the Board in support of its finding that Lacks' violation was "willful" was Mitchell's testimony regarding warnings he claimed to have given Lacks in her capacity as faculty sponsor of the school newspaper, concerning the use of profanity in the paper. Exh. 217. Mitchell's testimony on this subject was impeached in the Board hearing and was thoroughly discredited at trial.[11]

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violations of the Student Discipline Code, and that Lacks should have disciplined Reginald for writing those poems.

[11] In the Board hearing, Mitchell testified that he had warned Lacks about the use of certain words in the newspaper; yet the

But in any event, Mitchell did not even *contend* that he had told Lacks that students' use of profanity in the newspaper—or in other written work—would constitute a violation of the *Student Discipline Code*.[12]

Although, as noted, Lacks raised the issue of Mitchell's racial bias at the hearing, the Board members "never discussed any alleged racial discrimination" in their deliberations. App. 14a.

C. Proceedings in the Eighth Circuit

1. *The Panel Opinion*

a. *The First Amendment Notice Claim*

The jury answered "no" to the question whether Lacks had "reasonable notice that allowing students to use profanity in their creative writing was prohibited." App. 9a. The Eighth Circuit, however, held that the jury was required to answer "yes." In so holding, the Eighth Circuit specifically acknowledged that the jury was free to disbelieve Mitchell's testimony that he had warned Lacks

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newspapers were introduced into evidence, and they did not contain any of the words Mitchell cited. *See* Hrg. Exh. 14. Mitchell's memoranda to Lacks concerning the newspaper also were in evidence at the Board hearing, and they made no mention of any concern about profanity. *See* Hrg. Exhs. 36, 37. At trial, Mitchell was forced to admit that his testimony before the Board about the newspapers was inaccurate. Tr. 1363.

[12] The District had a *separate* policy, applicable *only to the newspaper*, which broadly required the newspaper's faculty advisors to "monitor style, grammar, format, and appropriateness of materials," and to "edit material considered obscene [or] libelous." Exh. 96; 46a-47a n.1. If what Mitchell claimed to have told Lacks —*viz.*, that it was "inappropriate" for the student newspaper to include "profanity . . ., negative reflections on teachers, things like that," Hrg. Tr. 174—could be understood as a reference to any particular policy of the District, that policy was the one applicable to the editing of the student newspaper, *not* the Student Discipline Code. *See* Hrg. Tr. 184-85 (testimony of Vernon Mitchell) (what Mitchell "mentioned about the paper [was] not only the profanity but just the inappropriateness of the materials"); Hrg. Tr. 174, 175, 178, 179, 182, 190-91, 240.

about profanity that he claimed had appeared in the school newspaper. App. 11a. Notwithstanding that—and notwithstanding the evidence canvassed above showing that, prior to Lacks' case, the Student Discipline Code had been understood by teachers and District administrators as having no application to student creative works—the court of appeals held "as a matter of law" that, because the language of the Student Discipline Code "contains no exception for creative activities," App. 10a, Lacks "took the risk that the board would enforce the policy as written." App. 11a.

b. *The Title VII Claim*

The Eighth Circuit also overturned the jury's verdict in favor of Lacks on her Title VII claim. In so doing, the court acknowledged that the jury properly could have concluded that Principal Mitchell and Assistant Superintendent Wright were motivated by race in pressing charges against Lacks. App. 13a. And the court acknowledged that the jury properly could have found that Mitchell was lying when he testified to the Board that he had warned Lacks about profanity in the school newspaper. App. 11a. That testimony, as the court further acknowledged, was explicitly relied upon by the Board in finding that Lacks acted with the "willfulness" necessary to sustain the termination of a tenured teacher for misconduct under Missouri law. App. 8a. Indeed, it was undisputed that the Board relied on no evidence other than Mitchell's testimony to establish that point.

But the Eighth Circuit held that the jury's verdict that Lacks was terminated because of her race could not stand, because "Mitchell and Wright did not make the decision to terminate Lacks; that decision was made by the school board." App. 13a. The court found it dispositive that neither Mitchell nor Wright made any specific "recommenda[tion]" in the Board hearing, and "the board made an independent determination as to whether Lacks should be terminated and did not serve merely as a conduit for the desires of school administrators." App. 13a-14a.

2. *The Dissent From the Denial of Rehearing En Banc*

Judge McMillian and Judge Morris Sheppard Arnold dissented from the Eighth Circuit's denial of rehearing en banc. In Judge McMillian's opinion in support of en banc rehearing, he reasoned that the Student Discipline Code "was not explicit with respect to [prohibiting profanity in] classroom creative assignments," and that, "in light of evidence that profanity in other student creative works—including one student-written play—was apparently condoned," it could not fairly be concluded as a matter of law that Lacks was on reasonable notice that "the profanity prohibition applied to creative writing assignments." App. 22a. As Judge McMillian saw it, upholding the termination of Lacks based on invocation of the Student Discipline Code in these circumstances implicated "issues of exceptional importance," App. 16a, because a legal regime that would permit a teacher to be fired for transgressing a policy that she justifiably "never even knew was there" would threaten to chill all teaching that might prove controversial, and would thereby threaten to "scare[] away" "all innovative and well-meaning teachers." App. 34a, 36a.

Judge McMillian emphasized that he would have "no quarrel with a school policy that clearly and strictly prohibits students from using profanity in all school-related activities," including creative writing, but he concluded that the District here did not have such a policy, and therefore Lacks was, in essence, terminated because she did not "pick [her] way through a mine field of competing and conflicting expectations, and changing and elusive legal standards." App. 35a.

REASONS FOR GRANTING THE WRIT

This case raises two recurring issues of exceptional importance as to which this Court has not spoken and as to which the courts of appeal have issued inconsistent, and in some instances directly contradictory, decisions. The first question involves the nature and scope of the First Amendment doctrine that requires reasonable notice

before the government may punish a person—particularly a public school teacher—for her speech. The second question is that of employer liability under Title VII for an employment decision made by high level managers who are not themselves motivated by racial animus, but whose decision is brought about by the racial animus of other agents of the employer. Both questions, squarely presented in this case, warrant review by this Court.

I. This Case Raises an Important Question That Has Divided the Circuits Concerning the Nature and Scope of the First Amendment Requirement That the Government Must Provide Teachers With Reasonable Notice as to What Speech Is Prohibited Before Disciplining Them for Their Expressive Activties.

1. This Court long has held that, " 'because First Amendment freedoms need breathing space to survive,' " the government may not penalize someone from engaging in speech unless it has provided notice sufficient to "clearly inform" the person as to what speech is prohibited. *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)). In *Keyishian*, the Court held that this requirement of fair notice must be enforced with particular vigilance in cases involving the discipline of teachers, because

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.
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> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . ." *Speiser v. Randall*, 357 U.S. 513, 526 [(1958)]. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button, supra*, at 433. The danger of that chilling

> effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

385 U.S. at 603-04.

Although *Keyishian* involved the rights of faculty members of public colleges, subsequent decisions have held that the requirement of clear notice applies equally to disciplinary actions taken against high school teachers for expressive activities. Shortly after *Keyishian* was decided, the First Circuit held in a pair of cases that the notice requirement is essential in both settings. *See Keefe v. Geanakos*, 418 F.2d 359, 362-63 (1st Cir. 1969); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971), *aff'g* 323 F. Supp. 1387, 1392 (D. Mass.) (Wyzanski, J.). More recently, the First Circuit reaffirmed its holdings on this subject in *Ward v. Hickey*, 996 F.2d 448, 453-54 (1st Cir. 1993). And other courts as well have held that the notice requirement applies in the high school setting. *See, e.g., Stachura v. Truzskowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd and remanded on other issues sub nom. Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

2. The Eighth Circuit purported to apply the notice requirement in this case, App. 10a, but the court in fact cut the heart out of the doctrine, and adopted an approach directly at odds with that of other circuits, by treating the notice inquiry as an abstract exercise in linguistics that can be performed by examining a particular regulation in a vacuum.

As we have noted, the jury specifically found that Lacks did *not* have "reasonable notice that allowing students to use profanity in their creative writing was prohibited." The jury reached that result on a record that is replete with evidence that District administrators had regularly tolerated, and even applauded, student works that contained profanity, and that neither teachers nor administrators had understood the Student Discipline Code as applying to students' creative writing. *See supra* at 5-8.

The court of appeals did not deny that the record contained such evidence; and the court acknowledged that the jury was free to discredit the only testimony that, if believed, might tend to establish that Lacks was on notice that profanity was prohibited in student writing—the testimony of Principal Mitchell concerning alleged use of profanity in the student newspaper. App. 11a. But the court dismissed all of the evidence of how the District's policy had in fact been understood and applied, saying:

> Even so, the policy against profanity was explicit. . . . In acting as [Lacks] did, she took the risk that the board would enforce the policy as written.

App. 11a.[13] The Eighth Circuit thus held that, "as a matter of law," App. 9a, the First Amendment notice requirement is satisfied as long as a written policy can linguistically be construed to prohibit the expressive activity at issue, no matter how strong the evidence may be that the individual who has been punished could not reasonably have understood the policy to be applicable.

This holding creates a square conflict with the First Circuit's decisions regarding the notice doctrine. In *Keefe*, for example, a school district sought to terminate a teacher for assigning to a class of high school students a magazine article containing the word "motherfucker" and for leading a classroom discussion in which the teacher said the word aloud. The school district claimed that the teacher was on notice that his conduct was prohibited because there was a regulation in place that provided that "[t]eachers shall use all possible care in safeguarding the health and moral welfare of their pupils, discountenancing promptly and emphatically: vandalism, falsehood, profanity, cruelty, or other form of vice." 418 F.2d at 362 n.10. The First Circuit determined nevertheless that the teacher was *not* on reasonable notice, because profanity had been tolerated in other educational

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13 *See also* App. 10a ("The Student Discipline Code clearly prohibits profanity and obscene gestures, and it contains no exception for creative activites.")

contexts at the school and because the regulation did not appear to be "apposite" to the conduct at issue. *Id.* at 362.

Thus, as the First Circuit recently reaffirmed in *Ward*, that Circuit takes the view that "t[h]e relevant inquiry is: based on existing regulations, policies, discussions, and *other forms of communication between school administration and teachers*, was it reasonable for the school *to expect the teacher to know* that her conduct was prohibited?" 996 F.2d at 454 (emphasis added).

The Eighth Circuit's decision here also is in conflict with the decision of the Ninth Circuit in *Cohen v. San Benardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1290 (1997). There, the court held that it was impermissible under the First Amendment for officials of a public college to apply a "[p]olicy's nebulous outer reaches to punish teaching methods that [the teacher] had used for many years," when those methods "had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College" prior to the adverse employment act at issue. *Id.* at 972. In reaching that conclusion, the Ninth Circuit did *not* suggest that the college's policy was *by its terms* inapplicable to the teacher's speech.

Cases in other contexts besides public education also have rejected the Eighth Circuit's notion that, where First Amendment activity is at issue, a person must "t[ake] the risk that the [government] would enforce [a] policy as written," App. 11a, regardless of the circumstances that would lead a reasonable person to think that the policy would not be so applied. Indeed, the approach taken by the court below has been rejected even in the *prison* context, where the notice doctrine is most circumscribed. Thus, in *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992), the Sixth Circuit held that, although a prison regulation required inmates to obtain prior approval from the warden before commencing any "group organizing activity," prison officials transgressed the notice require-

ment when they disciplined inmates who had circulated a petition without obtaining such approval, because, at the prison in question, "inmates . . . ha[d] been allowed to circulate numerous petitions over the years while the relevant regulations were in force" without obtaining prior approval, and the plaintiffs therefore "had no reason to believe that they were engaging in activity prohibited by prison regulations when they circulated the petitions." *Id.* at 717.

The Fifth Circuit likewise has held that actual enforcement practices under a government regulation or policy must be considered in determining whether an individual was on reasonable notice that her expressive activities might be found to constitute a violation, even where the terms of the regulation or policy might appear to prohibit those activities:

> Over time—indeed, probably fairly quickly—certain patterns of enforcement and tacit understandings will develop. This "less formalized custom and usage," *Parker v. Levy*, 417 U.S. 733, 754 (1974), will clarify much of the inevitable imprecision. Supreme Court decisions strongly suggest that the authorities will not be permitted to prosecute conduct permitted by those understandings, *see, e.g., id.; Cox v. Louisiana (II)*, 379 U.S. 559, 568-73 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959), *even if it is apparently proscribed by the ordinance itself*. "Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940).

International Society for Krishna Consciousness v. Eaves, 601 F.2d 809, 831 (5th Cir. 1979) (emphasis added).

3. The essential fallacy that underlies the Eighth Circuit's contrary reasoning is the notion that, when a particular regulation or prohibition contains "no exceptions," it naturally should be read to apply to every activity that conceivably could be covered by its literal language. Even putting aside First Amendment concerns—and even

in the absence of evidence regarding the actual application and interpretation of a policy such as was presented in this case—that is *not* always the natural way to read a regulation. As then-judge Breyer explained in *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1261 (1st Cir. 1992):

> Exaggerating to explain our point, we find the Government's interpretation a little like that of, say, a park keeper who tells people that the sign "No Animals in the Park" applies literally and comprehensively, not only to pets, but also to toy animals, [and] insects. . . . If one met such a park keeper, one would find his interpretation so surprisingly broad that one simply would not know what he really meant or what to do.

In the present case, a teacher reading a Disciplinary Code applicable to student "behavior," and covering such matters as "theft, gambling . . ., littering . . . [and] possession of glass bottles," *see supra* at 5, cannot fairly be expected to assume—in the face of extensive contrary evidence—that classroom creative writing is part of the "behavior" addressed by the Code.

Whatever may be true in other contexts, where the issue of notice arises in the context of *First Amendment activity*, the Eighth Circuit's approach is entirely out of place, and cannot be reconciled with the teaching of *Keyishian* and the holdings of other circuits. The crucial understanding that has guided this Court's recognition of reasonable notice as a *First Amendment* requirement, particularly in the sphere of public education, is the importance of ensuring that individuals not be induced by fear of possible penalties to "steer far wider of the unlawful zone" than the government actually intends or may properly demand. *Keyishian*, 385 U.S. at 604, quoting *Speiser*, 357 U.S. at 526. One circumstance in which that problem comes to the fore is where, as in *Keyishian*, a regulation uses vague terms. But the same problem can arise from "the exhaustiveness of the . . . language [of a

policy if read] literally," *Data Translation*, 984 F.2d at 1261, particularly where the government's actual *enforcement* of the policy suggests a narrower applicability than a literal reading of the policy might permit. If an individual confronted with a vague policy, *or* with a policy that has not been applied literally, is subject to punishment unless he or she acts in accordance with *the most expansive possible reading* of the policy, the result will be the very chilling effect that the First Amendment notice requirement seeks to prevent.

4. The context in which the notice issues arises in this case is both a recurring one and one that provides a particularly cogent illustration of the point just made. The Student Discipline Code involved in this case is a garden-variety code of student conduct such as exists in virtually every school district. *See supra* at 5 (quoting text of the Code). It certainly is *not* the case that every school district that prohibits swearing in the hallways would wish to have its teachers discipline students for any and all use of profanity in their creative works: undoubtedly many districts would agree with the testimony of the Executive Director of the National Council for Teachers of English, Tr. 1106, 1114-18, that such an approach would be educationally unsound. Yet the plain import of the Eighth Circuit's decision is that, in every school district that has a student discipline code, a teacher "t[akes] the risk" of punishment if she does not treat classroom creative writing as subject to the same prohibition of the use of profanity as applies to hallway cursing.

Thus, the Eighth Circuit's ruling on the notice issue conflicts with the decisions of other circuits, and, if not reversed by this Court, is likely to induce teachers across the country to "steer far wider of the unlawful zone" by prohibiting or punishing student speech that, in many instances, school officials would not actually wish to prohibit. Certiorari should be granted to review this ruling.

II. This Case Raises an Important Question That Has Divided the Circuits Concerning Employer Responsibility Under Title VII for Employment Actions Infected by Discrimination on the Part of Supervisors Below the Rank of Final Decisionmaker.

1. It is common in both the public and private sectors for an employer to make certain personnel decisions—including in particular promotions and terminations—through a process in which various agents of the employer play different roles. Often the ultimate decision is made by high ranking managers or supervisors, but the decision is strongly affected by the actions of supervisors at lower levels in initiating charges or recommendations, providing information or evaluations, and otherwise participating in the decisionmaking process. Where the ultimate decisionmakers had no impermissible motive, but supervisors who played a crucial role in the process acted out of racial animus or some other unlawful purpose, the question whether to impose liability on the employing entity gives rise to difficult issues that have commanded this Court's attention under a number of different federal civil rights statutes.

For example, in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court held that municipalities are not liable under 42 U.S.C. § 1983 for wrongful employment actions taken at the instance of an official who lacks final policymaking authority over such actions, even if the subordinate official's actions are simply rubber-stamped without any substantive review by the final decisionmaker. *See id.* at 128 (plurality opinion); *id.* at 137 (opinion of Brennan, J., concurring on this point). The Court adopted similar principles of employer responsibility under 42 U.S.C. § 1981 in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989).

More recently, in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998), the Court held that, under Title IX of the Civil Rights Act, a school district is legally responsible for sexual harassment of a student by an

employee only where an official with the authority to institute corrective measures on the employer's behalf knows about the wrongful conduct and acts with "deliberate indifference" to it—a standard the Court noted was consistent with its standard of employer responsibility under § 1983. 118 S. Ct. at 1999.

In *Gebser*, however, the Court was careful to emphasize that Title VII is governed by different principles of employer responsibility, inasmuch as Title VII "explicitly defines 'employer' to include 'any agent' " of an employer for the purpose of its prohibition against acts of employment discrimination undertaken by an "employer." *Id.* at 1996. The Court has not yet addressed under Title VII the question of employer responsibility for decisions that are made by unbiased final decisionmakers but that have been infected in one way or another by the discriminatory animus of supervisors at a lower level.

The Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), illustrate that the apparent simplicity of Title VII's statutory employer-responsibility language is not matched by a simplicity of application where the wrongfulness of the behavior in question stems from the dereliction of agents who are not at the top of the employer's hierarchy. But the analysis and holdings in *Ellerth* and *Faragher* are confined to the unique context of sexual harassment, and do not provide clear guidance with respect to the very different questions presented by the numerous cases, such as this one, in which high ranking officers of an entity have taken adverse employment action without any discriminatory intent, but the discriminatory animus of subordinate agents has affected the decisionmaking process—whether because those agents applied racially discriminatory standards in determining whether to initiate investigations of possible employee misconduct in the first instance, *see, e.g., Simpson v. Diversitech*, 945 F.2d 156 (6th Cir. 1991); or because they presented false or dis-

torted accounts of the employee's conduct or performance to the final decisionmaker, *see, e.g., Griffin v. Washington Convention Center,* 142 F.3d 1308 (D.C. Cir. 1998); *Gusman v. Unisys Corp.,* 986 F.2d 1146 (7th Cir. 1993); *Roebuck v. Drexel University,* 852 F.2d 715 (3rd Cir. 1988); or because they distorted the decisionmaking process in some other racially-motivated manner.

2. In the absence of guidance from this Court, the decisions of the courts of appeal in this area have been inconsistent in their results and unclear as to their underlying rationales.

Many courts have simply assumed that if a supervisor's animus plays any causative role in an employee's termination, the employer is liable for the consequences of the termination, notwithstanding the innocence or good faith of the employer's final decisionmakers. For example, in *Simpson v. Diversitech, supra,* an African-American employee was discharged after having committed three separate disciplinary offenses. The investigation of the second of those three offenses was initiated out of racial animosity by a supervisor, but that supervisor played no role either in the final decision to discipline the employee for that particular offense or in the later decision to terminate the employee for the combined effect of having committed three offenses. Even though those decisions were all made by high-level managers who made an "independent assessment and judgment" of the facts giving rise to the charges of misconduct, the Sixth Circuit found the employer liable for the employee's discharge because, but for the supervisor's animus, the employee would not have been reported for the second offense and would not have been terminated as a result of the third offense. 945 F.2d at 159.

Judge Cornelia Kennedy dissented from the Sixth Circuit's decision in *Simpson,* rejecting the proposition that liability flows to the employer under Title VII whenever a supervisor's discriminatory motive is the "but for" cause of an adverse employment action. *Id.* at 162. According

to Judge Kennedy, liability should attach to an employer under Title VII only when the persons who actually made the termination decision acted out of a discriminatory motive. *Id.* at 163.

The District of Columbia Circuit's recent decision in *Griffin* is to the same effect as *Simpson*. In *Griffin*, the final decisionmaker consulted with several of her subordinates in addition to the biased supervisor, and with the employee's union representative as well, before deciding to fire the employee. The court of appeals held that, even though the final decisionmaker did not accord automatic deference to the supervisor—indeed, the decisionmaker had *rejected* an earlier recommendation by the supervisor that the employee be terminated—the employer nevertheless was not entitled to judgment as a matter of law, because the biased supervisor was the decisionmaker's "chief source of information" about the employee. 142 F.3d at 1311.

The Third Circuit's decision in *Roebuck* goes even farther in finding employer responsibility. Under the multi-level tenure review process followed by the defendant university in that case, "each successive evaluator performed a *de novo* review of [the] candidacy," yet the court held that the finder of fact was entitled to conclude that the university's decision to deny tenure to the plaintiff was tainted by discrimination at a low level in the process, because each evaluator "*considered* the reports and recommendations of each previous evaluator." 852 F.2d at 727.

3. In sharp contrast to the decisions of other circuits, the court below held that the School District was insulated from liability for any racially motivated actions taken by Principal Mitchell or by Assistant Superintendent Wright in connection with the decisionmaking process that resulted in Lacks' termination, because the Board did not itself act out of racial animus, and the Board did not "defer" to any "recommendation" made by Mitchell or Wright. App. 13a-14a. The court found it conclusive that "the school board never discussed any racial discrim-

ination against Lacks by school administrators," and that "the board made an independent determination as to whether Lacks should be terminated." App. 14a.

In reaching this result, the Eighth Circuit did not purport to determine that the jury lacked sufficient evidence for its specific findings that Lacks *would not have been terminated but for her race. See supra* at 3 (quoting the special interrogatories answered by the jury on this point). As we have noted, Lacks could not be terminated unless the Board found that she "willfully" violated District policy; Mitchell's testimony was the sole evidence on which the Board relied in finding willfulness; Mitchell's testimony was false; and there was evidence from which the jury could find that Mitchell was racially motivated. The jury therefore properly could have found that, but for the racially-motivated false accusations of Principal Mitchell, the Board would not have found Lacks to have engaged in any willful violation, and would not have terminated her. The jury also properly could have found that, but for the racial animus of Mitchell and Wright, who conducted the investigation into Lacks' conduct and drafted the charges against her, charges never would have been brought to the Board in the first place.

The decision below does not purport to conclude that the jury could not properly have made such findings on this record. Rather, the Eighth Circuit's holding is that, as a matter of law, the District cannot be held liable in this case because *the Board itself* was not biased, and Mitchell and Wright did not make a formal recommendation that was rubber-stamped by the Board. App. 13a-14a. Under *Praprotnik* and *Jett*, that rationale would be defensible if this case were brought under §§ 1983 or 1981. But the decision below offers no explanation as to how Title VII's very different statutory language admits of the approach the court here adopted.

In explaining its decision, the court cited *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), in which, after ruling in favor of the *plaintiff* on the ground that a final

decisionmaker's lack of a discriminatory animus is *not* sufficient to insulate an employer from liability under the Age Discrimination in Employment Act where the decisionmaker's review of the statements of a biased supervisor is "perfunctory," *id.* at 405, the Seventh Circuit went on to suggest in dicta that an employer should be insulated from liability if its decision to terminate the employee is 'independent," *id.* at 406. The *Shager* court did not elaborate on what qualifies as an "independent" decision for this purpose, except to say that blind deference, in the form of a "rubber stamp" review process, does *not* qualify. *Id.* Judge Posner's opinion in *Shager* is the only court of appeals decision besides this one to suggest possible limiting principles for employer liability in a case of this nature; but, like the decision below, *Shager* neither articulated a clear standard of employer liabilty nor explained how the standard applied was derived.

Whether or not the decision below is consistent with *Shager*,[14] it clearly is in conflict with the decisions of the

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[14] In *Shager*, the court reversed a grant of summary judgment in favor of the employer on the basis that a reasonable jury could find the following: that the employee's supervisor was biased against older workers; that the supervisor submited a report to the employer's final decisionmaking committee in which he portrayed the employee's performance in the "worst possible light"; that the supervisor's account of the employee's performance in the report was facially "plausible"; and that the committee "*was not conversant with* the possible age animus that may have motivated" the supervisor's report. *Id.* at 405 (emphasis added). The phrase in italics appears to presuppose that a properly functioning decisionmaking body "conversant" with the evidence of a supervisor's animus must, at a bare minimum, explore the possible effect of that animus on the credibility of the supervisor's representations regarding the employee before accepting the supervisor's version of disputed events as true.

That did not happen in this case. Here, as the court below stated, the evidence showed that the Board "never discussed any alleged racial discrimination" in its deliberations. App. 14a. That fact, far from *relieving* the employer of liability under the rationale of *Shager* as the court below appeared to believe, *id.*, instead more firmly suggests a *basis* for liability under that rationale.

Third, Sixth, and District of Columbia Circuits in *Roebuck, Simpson, and Griffin, supra.* In *Roebuck* and *Griffin,* reliance by the final decisionmaker on facts filtered through a biased subordinate was held sufficient to give rise to employer liability, *see supra* at 26; and in *Simpson,* the sole fact that the supervisor *initiated the charges* out of racial animosity was deemed sufficient to render the employer liable, *see supra* at 25. Here, Principal Mitchell gave crucial false testimony on which the Board relied; and both Mitchell and Assistant Superintendent Wright were responsible for initiating the charges against Lacks and moving them forward. Thus, the conflict between the decision in this case and *Roebuck, Simpson,* and *Griffin* could not be clearer.

4. Not only do the circuit court decisions on the question presented here reach inconsistent results, but the opinions that the courts have rendered in this area of the law are sketchy and conclusory in their discussions of the employer responsibility issue, with the result that no comprehensive framework of analysis has emerged that can aid the decision of future cases. In that regard, the decision below is typical: the court reached its conclusion without any discussion of how its view of the law could be derived from the language and purposes of Title VII or from any principles of agency law.

This lack of a comprehensible analytic framework can only be expected to compound the existing confusion in the law, leaving employers and employees uncertain as to their responsibilities and their rights under Title VII, and resulting in decisions that cannot be reconciled in any principled way.[15] In some cases, like *Roebuck, Simpson*

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[15] Indeed, in the short time since the Eighth Circuit rendered its decision in this case, the confusion in the law has been further compounded by that court's 2-1 decision in *Kramer v. Logan County School District No. R-1,* 157 F.3d 620 (8th Cir. 1998), where the court *upheld* a Title VII jury verdict against the employer school district, even though the employee had a full hearing before an unbiased school board before she was terminated. The dissenting

and *Griffin*, the employer will be held liable even though the ultimate decisionmaker acted without racial animus and made an independent judgment; in other cases, like this one, an employee who would not have been terminated but for the racially motivated actions of an agent of the employer will be left without redress. Certiorari should be granted so that this Court can clarify the law on this important and recurring question.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to decide both questions presented in this Petition.

Judge in *Kramer*, who sat on the panel in the case *sub judice*, found the two cases to be indistinguishable. *Id.* at 629 ("Our recent precedent in *Lacks* demands that we set aside the jury's verdict.") The majority opinion by Judge Limbaugh, on the other hand, did not even cite the decision in this case. Judge Richard Arnold, who wrote the opinion below, penned a separate concurring opinion in *Kramer* for himself only, in which he purported to reconcile *Kramer* and *Lacks* on the basis that, in his view, "[t]he evidence of bias on the part of the administrators in *Lacks* was very weak, and the misconduct of the teacher (or what the board regarded as misconduct) was egregious." *Id.* at 627.

Judge Arnold's effort in *Kramer* to explain the result in this case only adds to the confusion in the law. *No* court of appeals has suggested that, where there is sufficient evidence of bias on the part of a supervisor to create a jury question—and the court's opinion below is predicated on the acknowledgement that there *was* such evidence with regard to Mitchell and Wright—the reviewing court's perception of the strength of that evidence somehow becomes a factor in determining whether the employer may be held liable for the supervisor's act. Nor has any court found the perceived "egregiousness" of the employee's alleged misconduct to be a relevant—much less a dispositive—factor in that regard. If the decision below were read with the gloss subsequently placed on it by Judge Arnold in *Kramer*, the lower-court law would only devolve into an even greater state of disarray.

Respectfully submitted,

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